

# SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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July 2, 2004

## San Francisco Bay Conservation Development Commission

### Notice of Proposed Rulemaking to Delete Commission Regulation Section 11325 and To Add To Title 14, Division 5 Proposed Commission Regulation Sections 10280 through 10289

**Time, Place, and Nature of Public Hearing:** The San Francisco Bay Conservation and Development Commission will hold a public hearing on **Thursday, August 19, 2004** at its regularly scheduled meeting to consider the adoption of regulations to implement a revised policy on ex parte communications. The meeting will start at 1 p.m.; the Commission will commence consideration of this matter and open the public hearing some time thereafter. The meeting will occur at the Metro Center Auditorium, 101 8th Street, Oakland, California. The room is wheelchair accessible.

**Informative Digest/Policy Statement Overview:** Currently, Commission Regulation Section 11325 (14 Cal. Code of Regulations Section 11325) establishes a formal policy on ex parte communications in enforcement matters. The Commission also has an informal policy concerning ex parte communications in permit matters, but the Commission has not adopted that policy as a regulations, so it is not enforceable.

The Commission established a committee to look into this matter. The committee and Commission directed the staff to commence a rulemaking procedure that would implement as much of a proposed policy that the committee and Commission had previously adopted in principle as would be consistent with existing California law located at California Government Code Sections 11405.20 through 11405.80 and 11410.10 through 11410.20, and 11430.10 through 11430.80.

Generally, the proposed regulations would do the following:

Proposed Section 10280: state the purpose of the proposed regulations;

Proposed Section 10281: define an ex parte communication;

Proposed Section 10282: define a quasi-legislative proceeding and a quasi-judicial proceeding and distinguish between the two;

Proposed Section 10283: provide that ex parte communications in permit and in enforcement matters are prohibited and establish how such communications must be disclosed and made part of the record if they nevertheless occur;

Proposed Section 10284: establish certain categories of communications that the proposed regulations would not prohibit;

Proposed Section 10285: establish the point after which in time any ex parte communications that occur must be disclosed;



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Proposed Section 10286: establish the procedure by which the Commission's Executive Director must notify all parties that an ex parte communication has occurred and make it available;

Proposed Section 10287: establish when a party can submit rebuttal evidence in response to an ex parte communication and when the Commission may reopen a public hearing to allow other interested persons and the public to comment on or respond to an ex parte communication;

Proposed Section 10288: establishes procedures for the Commission to follow if an Commission member receives an ex parte communication after the Commission has closed the public hearing and the time for the receipt of written comments and materials has passed; and

Proposed Section 10289: establishes procedures for Commission members who want to a field trip to the site of a proposed project that is the subject of a pending Commission permit application or to the site of a pending enforcement matter.

**Authority:** Government Code Section 66632(f); Public Resources Code Section 29201(e); and Government Code Section 11400.20.

**Reference:** Government Code Sections 66632, 66638, and 66641.5; Public Resources Code Sections 29520, 29524, and 29601; and Government Code Sections 11405.20, 11405.30, 11405.40, 11405.50, 11405.60, 11405.70, 11405.80, 11410.10, 11410.20, and 11430.10 through 11430.80.

**Disclosures Regarding the Proposed Action.** The Commission has made the following initial determinations:

**Mandate to Local Agency or School District:** none

**Costs to Any Local Agency or School District:** none

**Other Nondiscretionary Costs or Savings Imposed on Local Agencies:** none

**Costs or Savings to State Agencies or In Federal Funding To the State:** none

**Significant Effect on Housing Costs:** none

**Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses To Compete With Businesses In Other States:** none

**Creation or Elimination of Jobs or Businesses, or Expansion of Business, in California:** The Commission has determined that the proposed regulations would not (1) create or eliminate jobs within California; (2) create new businesses or eliminate existing businesses within California; or (3) affect the expansion of businesses currently doing business within California.

**Business Reporting Requirements:** none

**Cost Impact on Representative Private Person or Business:** The Commission is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**Effect on Small Business:** The proposed regulations would have no effect on a small business because the proposed regulation only concerns under what circumstances a Commission member or Commission committee member can or cannot receive a communication outside of the formal hearing process for a quasi-judicial matter, how such a communication must be disclosed if it occurs, and how the Commission must respond to the receipt of such a communication.

**Alternatives.** In accordance with Government Code Section 11346.5(a)(13), the Commission must determine that no reasonable alternative that it considers or that has otherwise been

identified and brought to the Commission's attention would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to the affected private persons than the proposed action.

Interested persons may present statements or arguments with respect to alternatives to this proposed action at the public hearing or during the written comment period.

#### **Contact Persons**

Inquiries concerning the proposed regulatory action should be directed to

Jonathan Smith  
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San Francisco Bay Conservation and Development Commission  
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The backup contact person is

Ellen Sampson  
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#### **Availability of text, initial statement of reasons, and rulemaking file**

Pursuant to Government Code Section 11346.5, the Commission will have the entire rulemaking file for this proceeding available for inspection and copying throughout the rulemaking process at its office at 50 California Street, Suite 2600, San Francisco. As of this date, the rulemaking file consists of this notice, the text of the proposed regulations, and the initial statement of reasons, including the documents referred to in the initial statement of reasons. Copies may be obtained by contacting Mr. Smith at the above address or telephone number.

**Date By Which The Commission Must Receive Written Comments and Where Written Comments Should Be Directed.** Written comments should be directed to Jonathan Smith at the address indicated above. Written comments must be received no later than 5 p.m. on Tuesday, August 24. Written comments received after that date and time will not be considered.

**Availability of Changed or Modified Text.** After holding the hearing and considering all timely and relevant comments received, the Commission may adopt the proposed changes substantially as described in this notice. Pursuant to Government Code Section 11346.8, if the Commission makes modifications that are substantially related to the originally proposed text, the Commission will make the modified text, with changes clearly indicated, available to the public at least 15 days prior to Commission action on the proposed modified text. Please send requests for copies of any modified text to Mr. Smith at the address indicated above. The Commission will accept written comments on the modified regulations for 15 days after the date on which they are made available.

**Availability of Final Statement of Reasons.** Once prepared, the final statement of reasons will be available as part of the Commission's rulemaking file and may be reviewed at the Commission's office or may be obtained by calling Mr. Smith (see contact person above).

**Internet Access.** The proposed regulations and related documents will be available for review and printing on the Commission's web site at [www.bcdc.ca.gov](http://www.bcdc.ca.gov).